

**House Committee on Education and the Workforce Subcommittee on Early Childhood,
Elementary, and Secondary Education**

Hearing on “School Choice: Expanding Educational Freedom for All”

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April 18, 2023

Introduction

It is my honor to have the opportunity to testify before the Committee regarding some of the major legal and policy issues surrounding public financing of private school tuition programs in the form of vouchers, education savings accounts, and analogous programs. For the purposes of this testimony, I will refer to these programs collectively as private school tuition programs. My testimony divides these legal and policy issues into four major categories: states’ constitutional duty regarding public education, which precedes any potential consideration of private school choice; the financial impact of private school tuition programs on public education; unequal access and discrimination in private school tuition programs; and student achievement.

Some of these legal and policy issues arise with charter schools as well—particularly those relating to the financial effects on public schools, the stratification and segregation of students between schools, and academic achievement—but this testimony directly addresses only private school tuition programs. It is worth noting, however, that because charter schools are public schools, they, unlike private schools, must comply with the U.S. Constitution and various federal anti-discrimination standards. Thus, this testimony’s concerns regarding federal constitutional and statutory rights are largely inapplicable to charter schools.

I. States’ Constitutional Obligations in Public Schools Take Precedent Over Private School Choice

Public financing of private school education for elementary and secondary students cannot be properly evaluated without situating it within a larger constitutional context. The first question regarding public financing of private school choice is not whether some individuals might prefer or benefit from it, but whether private school subsidies are permissible under state constitutions. Jumping to the substantive merits or shortcomings of private school choice, quite simply, ignores and mis-orders state governments’ priorities and obligations.

All fifty state constitutions include provisions that mandate the provision of public education. These affirmative state constitutional mandates in public education include qualitative components—such as the provision of an adequate or equal education. They also include

requirements that public schools be organized into a statewide “system” and that the system be “uniform.”¹ These obligations are absolute. Both explicit constitutional language and judicial interpretations describe these obligations as states’ paramount or foremost duty, which is to say that no other priorities can come before them, nor can exigencies justify a state’s failure to discharge the duty.²

Various state constitutional clauses also directly limit states’ involvement in financing private school education and reserve certain resources for the exclusive use of public schools. The purpose of these restrictions is to ensure states remain wedded to public education as their top priority and that other programs do not compete for or misuse funds that should otherwise be spent on public schools. For instance, most state constitutions identify specific funds—such as the common school fund, tax revenues raised for public schools, or revenues generated from public lands—as exclusively for public schools.³ This type of restriction required the Florida Supreme Court to strike down the state’s voucher program in *Bush v. Holmes*.

Other mechanisms, such as requiring that the public education appropriation be in a state’s first appropriation each year, similarly aim to ensure public education’s primacy. The contravention of such a rule required the Nevada Supreme Court to declare the state’s voucher bill unconstitutional in *Schwartz v. Lopez*. Lest these directives be insufficient to make the point, several state constitutions place explicit bars on funding private school education, regardless of the source, in the attempt to preclude legislative workarounds. Such a provision was the basis for the South Carolina Supreme Court striking down a voucher program in *Adams v. McMasters*.

It is also worth emphasizing that these state constitutional education clauses are a function of the U.S. Constitution’s mandate in Article IV, § 4 that Congress guarantee a republican form of government in the states. Since the nation’s founding, the provision of public education has been understood as a central pillar of democracy and a republican form of government.⁴ In fact, prior to the adoption of the U.S. Constitution, the Continental Congress enacted the Northwest Ordinances of 1785 and 1787. The Northwest Ordinance of 1787 is recognized alongside the Declaration of Independence, Articles of Confederation, and Constitution as one of the nation’s four foundational documents. The Northwest Ordinance of 1787 forever ensured the provision of education in the territories and set the rules by which these territories could become states.⁵ Congress later made the provision of public education a condition of southern states reentering

¹ See, e.g., *Rose v. Council for Better Education*, 790 S.W.2d S.W.2d 186, 205 (Ky. 1989) (the General Assembly had an “obligation . . . to provide for a system of common schools”); § 2 Wyo. Const. art. VII, § 1; Colo. Const. art. IX, § 2.

² See Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 102 CORNELL LAW REVIEW 1359 (2018); Derek W. Black, *Averting Educational Crises*, 94 WASHINGTON UNIVERSITY LAW REVIEW 423 (2017).

³ See, e.g., JOHN MATHIASON MATZEN, STATE CONSTITUTIONAL PROVISIONS FOR EDUCATION: FUNDAMENTAL ATTITUDE OF THE AMERICAN PEOPLE REGARDING EDUCATION AS REVEALED BY STATE CONSTITUTIONAL PROVISIONS, 1776-1929 at 129-35 (1931) (surveying states’ common school fund provisions).

⁴ Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME LAW REVIEW 1059 (2019).

⁵ See Black, *Fundamental Right to Education*, *supra*; DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY (2020).

the Union.⁶ In fact, after the Civil War, no state would ever enter the Union without providing for education in its constitution. The single one to try, New Mexico, saw Congress reject its admission.

II. The Financial Impact of Private Tuition Programs on Public Education

This constitutional and legal backdrop precludes the consideration of private school tuition programs in a vacuum. The first factual question is whether states have discharged their state constitutional obligation to public schools. If not, adopting a private school tuition program is a dereliction of duty—one that will likely compound one constitutional violation on top of another. Though the factual and legal circumstances differ by state, various studies strongly suggest that many, if not most, states are failing to provide their students with the financial resources necessary to receive an adequate education, and these funding gaps tend to increase when states adopt private school tuition programs. Thus, rather than affording more educational opportunity, these private school tuition programs have the practical effect of further denying students who remain in public schools of their state constitutional right to education (and as discussed later, do not ensure better opportunities for disadvantaged students who participate in the tuition programs).

For instance, national studies have demonstrated a consistent pattern of underfunding in Florida’s public schools. The Education Law Center issues annual reports on school funding. Its most recent report rated Florida’s funding level as an F, its funding effort as an F, and its distribution of those meager funds among schools as a D.⁷ To be clear, several other states received A and B ratings on these metrics. Moreover, these higher scoring states do not typically support private school tuition programs (except for a highly contextual and limited program to support students living in remote regions that cannot support high schools in Vermont and Maine).

Another national study led by Bruce Baker in 2018 assessed whether schools had the resources to achieve “average” outcomes. Average outcomes, to be clear, are probably lower than adequate outcomes but easier to measure. It found that most states fail to provide requisite resources to school districts serving predominantly low-income students. But the study found that even in Florida’s wealthiest districts, students received slightly less than they needed, and, in high-poverty districts, the funding gap exceeded \$4,000 per pupil.⁸

Data suggests that gaps of this sort have grown substantially since the Great Recession. At that point, Florida, for instance, began drastically reducing its public education expenditures while dramatically increasing its private school expenditures. A decade and a half later, Florida spends roughly \$1 billion dollars a year on private school tuition. This is notwithstanding the fact that its public schools are severely underfunded and its constitution declares education “a fundamental

⁶ Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STANFORD LAW REVIEW 735 (2018).

⁷ EDUCATION LAW CENTER, MAKING THE GRADE: HOW FAIR IS FUNDING IN YOUR STATE? (2022), <https://edlawcenter.org/assets/files/pdfs/publications/Making-the-Grade-2022-Report.pdf>.

⁸ BRUCE BAKER ET AL. THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOLS (2018).

value of the people of the State of Florida” and makes it a “paramount duty of the state to make adequate provision . . . a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education.” While Florida may be an egregious example, it is not alone. Other states have exponentially expanded private school tuition programs while seemingly failing to discharge their public education duty.⁹ One study found that that “students across the U.S. lost nearly \$600 billion from the states’ disinvestment in their public schools” in the decade following the Great Recession.¹⁰

Private school tuition programs often proceed on the false assumption that the diversion of students away from public schools will save public schools money. While public schools do see some reductions in costs when students attend private schools, those “savings” are neither automatic nor proportional. First, many state programs do not require students participating in private school tuition program to have previously attended a public school.¹¹ As a result, private school tuition programs can fund student who never would attended public school anyway. This makes the tuition program an extra state cost rather than a savings.

Second, many public school expenditures are fixed, meaning that they do not necessarily change even when students do leave public school and enroll elsewhere. The school buses will still run the same routes, the heating and cooling systems will run just as long, and the roof and other aspects of the facility will deteriorate at the same rate. Schools’ largest costs, however, are personnel. But public schools cannot dismiss five percent of the teaching staff just because its student population dipped by five percent, for instance. Unless a public school system is willing to dramatically increase class sizes, eliminate certain aspects of the curriculum, or close and consolidate schools, it will often need the same number of teachers. As a result, private school tuition programs can force public schools to try to meet the same student needs but with fewer resources.

III. Discrimination and Unequal Access in Private School Tuition Programs

School choice programs also raise several fundamental concerns regarding equal access, discrimination, and religion. First, private school tuition programs initially grew out of state attempts to resist desegregation. While much has changed since then, certain aspects of that legacy continue today. Second, as of 2019, fewer than half of states’ private school tuition programs prohibited race discrimination.¹² And the race discrimination prohibitions that do exist do not necessarily extend beyond the enrollment process, meaning that few states require fair treatment inside the school once a student enrolls. Fewer than one in four state programs

⁹ See Black, *Preferencing Educational Choice*, *supra*; SAMUEL E. ABRAMS AND STEVEN J. KOUTSAVLIS, THE FISCAL CONSEQUENCES OF PRIVATE SCHOOL VOUCHERS (2023), https://pfps.org/assets/uploads/SPLC_ELC_PFPS_2023Report_Final.pdf.

¹⁰ DANIELLE FARRIE & DAVID G. SCIARRA, \$600 BILLION LOST: STATE DISINVESTMENT IN EDUCATION FOLLOWING THE GREAT RECESSION, EDUCATION LAW CENTER 2 (2021), [https://edlawcenter.org/assets/\\$600%20Billion/\\$600%20Billion%20Lost.pdf](https://edlawcenter.org/assets/$600%20Billion/$600%20Billion%20Lost.pdf).

¹¹ Public Funds Public Schools, *The Myth of Cost Savings from Private School Vouchers* (2020), https://pfps.org/assets/uploads/CR_PFPS_Fact_Sheet_Cost_Myths_DEC_2020-2_003_.pdf.

¹² Derek W. Black, *When Religion and the Public-Education Mission Collide*, 132 YALE LAW JOURNAL FORUM 559 (2022).

prohibited disability discrimination or sex discrimination. Only twelve percent protect against sexual-orientation discrimination. Moreover, as to disability, some states require students with disabilities to waive their federal disability rights as a condition of participation in the state's private school tuition program.¹³

Unequal access also runs along lines of religion, as religious schools can reserve the right to deny admission to students whose beliefs does not align with that of the school. Though empirical evidence is still being developed, numerous initial reports indicate that religious schools have been denying access to certain students. In North Carolina, Florida, and Indiana, for instance, LGBTQ students and families attempting to enroll at religious schools using vouchers have been turned away.¹⁴ By contrast, constitutional and federal law precludes all these forms of discrimination in public schools.

The textbooks in some schools that participate in private school tuition programs are also promoting anti-science and white-centric ideas. The Orlando Sentinel reported, for instance, that some of the private schools participating in Florida's private school tuition program teach students that dinosaurs and humans lived together, God intervened to prevent Catholics from dominating North America, slavery benefitted its victims by exposing them to Jesus Christ, and most Black and white southerners lived in harmony.¹⁵ Other investigative reports reveal similarly disturbing curriculum.¹⁶

School choice proponents have attempted to deflect the foregoing issues and inequities by arguing that these programs equalize the playing field by generally offering disadvantaged students the same choice as more financially advantaged students. Facts, however, indicate that these programs do not necessarily operate this way. While the earliest programs made benefits available only to low-income families, states have steadily eliminated or raised those caps over the last decade.¹⁷ In fact, opening the programs to all students—not serving more disadvantaged students—explains much of the increase in private tuition expenditures over the last decade. Moreover, because tuition costs often substantially exceed the value of those benefits at many private schools—particularly higher quality private schools—they do not easily open the doors to higher quality education for the most economically disadvantaged, but rather lower the cost of attendance for higher income students who may have attended the schools anyway. Under these circumstances, private school tuition programs facilitate new and additional forms of segregation in the private sector.

¹³ Claire S. Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 EMORY LAW JOURNAL 1038 (2019).

¹⁴ Black, *When Religion and the Public-Education Mission Collide*, *supra*.

¹⁵ Leslie Postal, Beth Kassab & Annie Martin, *Private Schools' Curriculum Downplays Slavery, Says Humans and Dinosaurs Lived Together*, ORLANDO SENTINEL (June 1, 2018), <https://www.orlandosentinel.com/news/education/os-voucher-school-curriculum20180503-story.html>

¹⁶ Rebecca Klein, *The Rightwing US Textbooks that Teach Slavery as "Black Immigration,"* GUARDIAN (Aug. 12, 2021); Rebecca Klein, *These Textbooks in Thousands of K-12 Schools Echo Trump's Talking Points*, HUFFINGTON POST (Jan. 15, 2021), https://www.huffpost.com/entry/christian-textbooks-trump-capitol-riot_n_6000bc <https://perma.cc/L975-KU8F>.

¹⁷ Black, *Preferencing Educational Choice*, *supra*.

Often missed in the discussion of the foregoing forms of discrimination and inequality is also the fact private tuition programs allow private schools to continue to pick and choose from student applicants based on academic credentials and other factors, such as behavioral history. In other words, formal discrimination aside, private schools still do not accept all students. This means states are using public dollars to support programs that do not ensure even a semblance of equal access.

Taken together, these dynamics facilitate the sorting, segregation, and stratification of students into demographic silos. These trends pose serious challenges for our democracy and run contrary to the governmental role in education. For two centuries, public financing of public education has been premised on the notion that public schools are the place where young people share a common experience, come to learn the public good, and where citizens—regardless of status—meet on an even playing field. In the long term, this public education project sustains a republican form of government. In fact, public schools are the only place in society premised on bridging the various gaps that normally divide us—race, wealth, religion, disability, sex, culture, and more. Today, our nation needs our schools to serve that function and heal wounds more desperately than any period in recent history. If government is no longer willing to pursue these democracy reinforcing goals, the *raison d'être* for financing education evaporates.

IV. Academic and Financial Misconceptions About Private Tuition Programs

Many school choice proponents believe that private schools offer an academic advantage over public schools and, thus, student achievement will increase when they leave public schools. Both assumptions are false. First, nationwide data sets demonstrate that there is no private school advantage when comparing “apples to apples.”¹⁸ While the average achievement scores are higher in some private schools, their student populations are vastly different than public schools. Their higher scores are a function of the fact that they serve far fewer, and sometimes almost no, disadvantaged students. The relevant comparison is whether low-income students, for instance, perform better in private schools than public schools, or whether a high achieving middle-income student would have performed better in a private school than in their public school. The answer to those questions is generally no.

Second, multiple nuanced studies of voucher programs have shown that students enrolling in private schools through private school tuition programs perform worse than their similarly situated peers in public schools. This lower achievement, moreover, can persist for years. The less negative studies merely find that private school tuition programs have no statistically significant impact on achievement. In other words, even the best-case scenarios are far from justifying private school tuition programs as academically efficacious.¹⁹

¹⁸ CHRISTOPHER A. LUBIENSKI AND SARAH THEULE LUBIENSKI, *THE PUBLIC SCHOOL ADVANTAGE: WHY PUBLIC SCHOOLS OUTPERFORM PRIVATE SCHOOLS* (2013).

¹⁹ For individual summaries of studies of the academic impacts of private school tuition programs, see Public Funds Public Schools, *Research*, <https://pfps.org/research/>.

Conclusion

Two centuries ago, Congress and states embarked on a public education project on the premise that a republican form of government requires an educated citizenry and the only means of ensuring that end is through public education at the public expense.²⁰ Likewise, they understood that public education uniquely promotes an appreciation for the common good, which binds the republic together.²¹ Unfortunately, Congress and the states have never fully achieved these goals. Public education has, like any such lofty goal, been a work in progress. Yet, public education has, as much as any aspect of the American story, been a central pillar of achieving a more perfect Union. Now is not the time to abandon this crucially important project but to redouble our efforts and recommit its premises. Our state constitutions do not allow anything less.

²⁰ BLACK, SCHOOLHOUSE BURNING, *supra*.

²¹ *Id.*